



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 29, 1995

Mr. N. C. Ristagno
Chief of Police
City of Lake Dallas
Police Department
P.O. Box 368
Lake Dallas, Texas 75065

OR95-300

Dear Chief Ristagno:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30230.

The City of Lake Dallas (the "city") received an open records request from a former city police officer for copies of statements given by two other police officers during an internal affairs investigation of charges of insubordination against the requestor. Both you and the city attorney have raised various exceptions to required public disclosure with regard to these statements. However, in your initial letter to this office, you raised none of the Open Records Act's specific exceptions listed in subchapter C of chapter 552 of the Government Code, nor was this office able to infer your intent to raise a specific exception. Only after the passage of one month did either you or the city's attorney raise specific exceptions and make arguments as to how those exceptions apply to the records at issue.

In Open Records Decision No. 515 (1988) at 6, this office held as follows:

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. City of Houston v. Houston Chronicle Pub. Co., 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest in withholding the information to overcome this presumption. Open Records Decision No. 319. *For this reason, a governmental body must show*

compelling reasons why this office should consider additional arguments, raised long after 10 days have elapsed, for withholding requested information. [Emphasis added.]

The city did not raise within the ten-day time period any of the act's exceptions to support its contention that the requested information was protected from required public disclosure. Consequently, the city has waived the act's "permissive" exceptions to required disclosure. The requested information is therefore presumed public information and must be released unless compelling reasons exist why the information should not be released.

In this instance we will consider both your and the city attorney's claims under section 552.101 because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. See Gov't Code § 552.352. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that because the records at issue pertain to a police internal affairs investigation the information is deemed confidential under section 143.089 of the Local Government Code. Please note that chapter 143 of the Local Government Code applies only to those municipalities that meet the requirements as specified in section 143.002. The city does not meet those requirements. Accordingly, section 143.089 is not applicable to records held by the Lake Dallas Police Department.

The city attorney contends that the requested information comes under the protection of section 552.101 of the Government Code because it constitutes "work product." We are uncertain whether the city attorney believes the requested statements constitute privileged police work product, see *Brem v. State*, 571 S.W.2d 314, 322 (Tex. Crim. App. 1978), or attorney work product. Regardless of the intended legal theory, however, we conclude that neither theory protects the information from public disclosure.

In the context of open records requests, the work product doctrine merely represents one aspect of the "litigation" exception, section 552.103 of the Government Code. Work product may be withheld only if it "relates" to pending or reasonably anticipated litigation to which the governmental entity is or may be a party. See Open Records Decision Nos. 575 (1990), 574 (1990) (discovery privileges not encompassed by statutory predecessor to § 552.101). The city has waived the protection of section 552.103 by not raising it in a timely manner. Accordingly, the city may not withhold the requested information as work product.

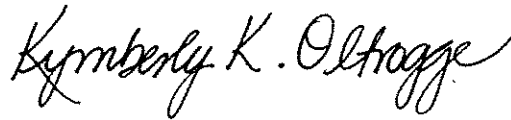
Finally, we note that the statements made by police officers under the protection of *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) warnings may not be withheld pursuant to section 552.101 as information deemed confidential by judicial decision. In *Garrity* the United States Supreme Court held that the Fourteenth Amendment prohibits the use in subsequent criminal proceedings of police officers' statements obtained under threat of termination. The court's holding in *Garrity* has no bearing on whether those

statements are confidential under the Open Records Act. See Open Records Decision No. 575 (1990) (discovery privileges not encompassed by statutory predecessor to § 552.101). We further note that these statements cannot be made confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Neither you nor the city attorney have made compelling arguments for withholding the information at issue. Accordingly, the city must release the information immediately.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/RWP/rho

Ref.: ID# 30230

Enclosures: Submitted documents

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